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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	9
Argument:	
I. The proceeding and order were for civil contempt and the notice of appeal under the Criminal Appeals Rules was therefore ineffective	11
II. The Federal Rules of Civil Procedure are not applicable to cure the ineffective appeal; and in any event there is no need for further proceedings in the Court of Appeals	23
Conclusion	26
Appendix	27

CITATION

Cases:	
Abrams v. *United States*, 64 F. (2d) 22	25
Alaska Packers Assn. v. *Pillsbury*, 301 U. S. 174	22
Bessette v. *W. B. Conkey Co.*, 194 U. S. 324	15
Bolich, Internal Revenue Agent v. *Rubel*, 67 F. (2d) 894	11, 19
Bowen v. *Johnston*, No. 359, present Term, decided January 30, 1939	24
Brownson v. *United States*, 32 F. (2d) 844	11, 19
Christensen Engineering Co., Matter of, 194 U. S. 458	14
Department of Health of the State of New Jersey v. *Borough of Fort Lee*, 108 N. J. Eq. 139	22
E. Ingraham Co. v. *Germanow*, 4 F. (2d) 1002	21
Enoch Morgan's Sons Co. v. *Gibson*, 122 Fed. 420	21
Federal Trade Commission v. *A. McLean & Son*, 94 F. (2d) 802	10, 20
Fox v. *Capital Co.*, 299 U. S. 105	14
Gompers v. *Bucks Stove and Range Co.*, 221 U. S. 418	15, 18
Gompers v. *United States*, 233 U. S. 604	13
Grossman, Ex parte, 267 U. S. 87	15
Guzzardi, In re, 74 F. (2d) 671	17
Helvering v. *Mitchell*, 303 U. S. 391	20
Internal Revenue Agent v. *Sullivan*, 287 Fed. 138	18
International Corporation Co., In re, 5 F. Supp. 608	19
Interstate Commerce Commission v. *Baird*, 194 U. S. 25	11
Interstate Commerce Commission v. *Brimson*, 154 U. S. 447	11, 19

Cases—Continued.	Page
Jones v. *Securities and Exchange Commission*, 298 U. S. 1	11
Lamb v. *Cramer*, 285 U. S. 217	14, 16, 17, 19, 21
Leman v. *Krentler-Arnold Co.*, 284 U. S. 448	19
Locrasto v. *State*, 202 Ind. 277	22
McCann v. *New York Stock Exchange*, 80 F. (2d) 211	21
Mason v. *United States*, 244 U. S. 362	25
Merchants Stock Co., Petitioner, In re, 223 U. S. 639	14
Michaelson v. *United States*, 266 U. S. 42	15, 21
Miles v. *United Founders' Corp.*, 5 F. Supp. 413	19
Miller v. *United States*, 95 F. (2d) 492	25
Nevitt, In re, 117 Fed. 448	15
Oriel v. *Russell*, 278 U. S. 358	15
People v. *Kizer*, 151 Ill. App. 6	22
Pitt v. *Davison*, 37 N. Y. 235	15
Stewart, In re, 121 Wash. 429	22
Tighe v. *Maryland Casualty Co.*, 99 F. (2d) 727	24
Union Tool Co. v. *Wilson*, 259 U. S. 107	14, 21
United States v. *Bittner*, 11 F. (2d) 93	21
United States v. *First National Bank*, 295 Fed. 142, affirmed, 267 U. S. 576	19
United States v. *Flegenheimer*, 82 F. (2d) 751	25
United States v. *Goldman*, 277 U. S. 229	12, 21
Utah Fuel Co. v. *National Bituminous Coal Commission*, No. 528, present Term, decided January 30, 1939	24
Wilson v. *Byron Jackson Company*, 93 F. (2d) 577	12
Witmer v. *District Court of Polk County*, 155 Iowa 244	22
Worden v. *Searls*, 121 U. S. 14	21
Statutes:	
Interstate Commerce Act of 1887, c. 104, 24 Stat. 379	11
Clayton Act, c. 323, 38 Stat. 731	13
Act of February 13, 1925, c. 229, 44 Stat. 936, Sec. 8 (c), as amended (U. S. C., Title 28, Sec. 230)	27
Judicial Code, Sec. 268 (U. S. C., Title 28, Sec. 385)	27
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 617	27
Sec. 618	28
Act of March 8, 1934, c. 49, 48 Stat. 399	13
Miscellaneous:	
Annual Practice, 1939, p. 809	16
Criminal Appeals Rules, 292 U. S. 661	13
Edwards on Execution, pp. 210–214	16
Federal Rules of Civil Procedure:	
Note to Rule 45	11
Rule 73 (a)	23
Rule 86	10
7 Halsbury's Laws of England, Tit. Contempt of Court	15
9 Holdsworth, History of English Law, 352–353	15
Huston, Enforcement of Decrees in Equity, 76–77	15
Sir John Fox, Contempt of Court, p. 44	16

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 360

WILLIAM McCRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. Its order of contempt appears at R. 79–83. The opinions in the Circuit Court of Appeals (R. 110–121) are reported at 100 F. (2d) 322.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1938 (R. 121–122). A petition for rehearing was denied on January 16, 1939 (R. 122). The petition for a writ of certio-

rari was filed on February 9, 1939 and granted March 13, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below correctly held that the proceeding and order were for civil contempt and that therefore the notice of appeal under the Criminal Appeals Rules was ineffective, there being no allowance of an appeal.

2. Whether the Federal Rules of Civil Procedure are applicable to render the appeal effective; and, if so, whether the order of contempt should be affirmed.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 27–29.

STATEMENT

On April 21, 1938, petitioner, a resident of Butte, Montana, was personally served with a revenue agent's summons, issued under the authority of Section 618 of the Revenue Act of 1928 (*infra,* p. 28), requiring him to appear before Special Agent DeFoe on that date to give testimony in connection with the tax liability of a named person for the years 1932 to 1937, inclusive (R. 22–23, 26). On April 22, 1938, the Government filed a motion in the United States District Court for the District of

Montana for an order of attachment of petitioner, requiring him to appear and show cause why he should not submit himself to examination (R. 27). This motion was based upon an affidavit of Special Agent DeFoe (R. 22–25), in which he stated that as a part of his official duties he was making an investigation of the correctness of a return made under the internal revenue laws by a citizen and resident of Montana, and that he had been informed that the petitioner possessed information concerning this matter (R. 22–23); that the special agent had served the above-mentioned summons or subpoena upon the petitioner (R. 23, 26); that the latter appeared and informed the special agent that he, the petitioner, did not propose voluntarily to answer any questions concerning the subject matter of the inquiry, and did not intend voluntarily to make any statement or give any information whatsoever concerning the subject of the inquiry; and that the petitioner failed and refused to make any statement or to answer any questions or to give any information concerning the subject of the inquiry (R. 23–24). The agent also stated that from his investigation he believed that the petitioner had personal knowledge of facts pertinent and material to the subject matter of the investigation, and that the petitioner was wrongfully withholding such facts and information and preventing the investigation (R. 24–25).

On April 23, 1938, the petitioner filed an answer, stating that he had appeared and was willing to testify as to any matter the answer to which would not incriminate him, that he had been advised by Special Agent DeFoe that if he refused to answer certain questions, that would be taken as a confession of guilt on his part, but that he was willing again to appear before the special agent, provided a competent stenographer of his own choosing should be allowed to appear (R. 27–28). On the same date the matter was heard by the District Court, which found that the petitioner was regularly required to appear before the special agent, and wrongfully failed and refused to give any testimony. The District Court ordered that the petitioner appear and testify before the special agent on that and subsequent dates, if necessary (R. 29–31).

On April 26, 1938, the special agent filed another affidavit with the District Court (R. 32–40), reciting that after the entry of the above-mentioned order of April 23, 1938, the petitioner appeared before the agent, and was sworn, but refused to answer any question, or to make any statement, as shown by a transcript, "Exhibit B," incorporated by reference (R. 36–37). This transcript (R. 43–45) shows that the petitioner admitted that he had appeared before the special agent pursuant to the order of the District Court, but that he refused to answer nine questions which were propounded to him, upon the ground of self-incrimination. The

petitioner was asked (1–2) whether he understood that the inquiry did not relate to his own liability; (3) whether he knew one Ron Pepple; (4) whether he at some time between February 1 and 10, 1937, accompanied Ron Pepple from Butte to Helena, Montana; (5) whether between said dates he had received from Ron Pepple a sum of money which was given to him by another person; (6) whether between said dates he received from a person other than Ron Pepple a sum of money which he subsequently paid to another person; (7) whether after being directed to appear and testify, he still declined to answer the questions propounded; (8) whether he would continue to refuse to answer similar questions for the reasons stated; and (9) whether he had anything to add to this statement. To each question petitioner replied that he refused to answer the question; that the answer to it would tend to criminate him; and that he would not be a witness against himself (R. 43–45). He also refused, on the same ground, to examine and sign the transcript of questions and answers (R. 45). The affidavit further stated that the investigation did not concern the petitioner or any income tax return made by him, or any act done or required to be done by him under the laws of the United States; that the investigation "concerns entirely another" and was not being carried on in the purpose or belief that the knowledge or information of the petitioner would subject the petitioner to any prosecution; and

that the petitioner was fully advised accordingly before being interrogated (R. 38–39).

This affidavit prayed for an order upon the petitioner to show cause why he should not be imprisoned until he should obey the prior order of the court, and thus purge himself of contempt (R. 39–40).

On April 26, 1938, the District Court ordered the petitioner to appear before it on April 27th and show cause why he should not be punished for contempt for disobedience of the court's order of April 23, 1938 (R. 46). On April 27, 1938, the petitioner filed a motion to quash, upon the grounds that the affidavit upon which the rule and order were made was insufficient in law and in fact; that the District Court had no jurisdiction over the person of the petitioner; that the proceedings were improperly entitled because no civil action was pending, no process had been issued, and there were no parties plaintiff or defendant; and that the petitioner's attorney was not allowed to represent him at the proceedings (R. 47–48). The District Court, after hearing (R. 50–57), overruled the motion to quash (R. 57). The petitioner's attorney then stated (R. 57) that "McCrone is here to plead." Mr. Brown, the Assistant United States Attorney, objected to the entry of a plea upon the ground that (R. 58) "This is no criminal proceeding." However, upon further insistence, the petitioner was allowed to enter a plea of not guilty (R. 58, 79). After further argument (R.

58–70), the petitioner was called as a witness in his own behalf (R. 71). He was interrogated regarding the questions asked by Mr. DeFoe, and stated that he believed the answer to a certain question would have incriminated him under the laws of the United States. The petitioner's counsel asked him whether another question and answer had been made at the hearing before the special agent, and under what law he believed he would incriminate himself (R. 72). The District Court stated that the mental attitude of petitioner was irrelevant, as he was not to be punished (R. 72–73), and the court asked to be informed of the facts upon which to judge "whether there is any reasonable probability any answer he might make would in any way tend to incriminate him" (R. 74). No further proof was offered (*ibid.*).

On April 28 the District Court entered its order (R. 79–83), finding that the matters set forth in the affidavit filed April 26, 1938, were true (R. 80), that the petitioner (R. 81) "wilfully and deliberately and wrongfully disobeyed the order and command of this Court entered herein on the 23rd day of April 1938, * * * and failed, refused, and neglected to give his said testimony as required by said order * * *." The order further stated (R. 82–83):

> The Court further finds that the said William McCrone did not on the 27th day of April 1938, or at all, and upon his appear-

> ance before the above-entitled Court, in obedience to the rule and order to show cause issued by this Court, show any cause whatsoever, or was any cause shown whatsoever by him or on his behalf, why he should not be held in contempt of the above-entitled court, or why he should not obey the order of this Court, dated April 23, 1938; the Court further finds that the prayer of the affidavit filed herein should be granted.
>
> Wherefore, * * * the said William McCrone be and he is hereby committed to the custody of the United States Marshal * * * to be * * * confined * * * and to be held in such confinement * * * until the said William McCrone purges himself of his said contempt by obeying the order of this Court, duly given and made on the 23rd day of April 1938, by giving his testimony before Paul W. DeFoe * * *.

The petitioner noted an exception (R. 84), and on May 2, 1938, a "Notice of Appeal" was served upon the United States Attorney and filed (R. 2–5), and assignment of errors was served and filed (R. 87–90). On May 6, 1938, the District Judge allowed and signed a bill of exceptions (R. 21–87). Bail was allowed by the Circuit Court of Appeals on May 9, 1938 (R. 108).

The court below dismissed the appeal (R. 121–122). It held that the contempt was civil, and that it had no jurisdiction, since petitioner took an appeal in the manner provided for appeals from a criminal judgment, and had not applied for, or

obtained, an allowance of an appeal. Haney, J., dissented, on the ground that the appeal was proper under the new Federal Rules of Civil Procedure. A petition for rehearing was denied on January 16, 1939 (R. 122).

SUMMARY OF ARGUMENT

I

The procceding and order were for civil contempt, and the notice of appeal under the Criminal Appeals Rules was therefore ineffective. The character of the order determines whether it is civil or criminal for purposes of appeal. Here the order was not punitive but coercive; it ordered the petitioner committed only unless and until he should obey the prior order of the court requiring him to testify. Moreover, there was no surprise or variance between the order and the proceedings leading up to it. If the action were one between private parties there could be no question that the order was purely civil and appealable accordingly.

It is no answer that here the order was entered at the instance of a Government officer. The fact that the Government is a party does not alter the character of the contempt or of the sanction imposed. If the Government were confined to proceedings for criminal contempt in cases of disobedience to procedural orders entered for its benefit, unfair and anomalous results would follow, with disadvantages to both the Government and the party charged with contempt.

The state courts, in applying the distinctions between civil and criminal contempts, have not regarded the fact that the State is the moving party as requiring a holding that the contempt charged is criminal.

II

The Federal Rules of Civil Procedure are not applicable to cure the ineffective appeal. Since the three-months period for taking an appeal in civil cases expired prior to September 16, 1938, when the Rules became effective, it is difficult to discover any basis for their application. The action was pending in the Circuit Court of Appeals in only a limited sense, and Rule 86 would appear not to be intended to revive a case for decision on the merits in these circumstances.

In any event, if the Court should conclude that the appeal was effective under the new Rules, there is no occasion to remand the case to the court below for further proceedings. The objections urged to the order adjudging petitioner in contempt are unsubstantial. There was no showing that the questions asked had any tendency to incriminate him under the laws of the United States; and he was advised by the summons of the identity of the taxpayer under investigation.

The judgment below should be affirmed; or, in the alternative, the order of the District Court should be affirmed.

ARGUMENT

I

THE PROCEEDING AND ORDER WERE FOR CIVIL CONTEMPT AND THE NOTICE OF APPEAL UNDER THE CRIMINAL APPEALS RULES WAS THEREFORE INEFFECTIVE

The summons served on petitioner April 21 was issued pursuant to Section 618 of the Revenue Act of 1928, *infra*, p. 28. Upon petitioner's refusal to answer questions put by the revenue agent, the agent sought the aid of the District Court to compel the testimony, pursuant to Section 617 of the Act, *infra*, p. 27.[1] To the application of the agent for an order of enforcement the petitioner filed an answer, and argument was heard by the District Court, which on April 23 granted the order of enforcement applied for (R. 29–31). It is clear that an appeal would have lain from this order of April 23; it constituted a final order in a civil action. *Interstate Commerce Commission* v. *Brimson, supra; Interstate Commerce Commission* v. *Baird,* 194 U. S. 25; *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1; *Brownson* v. *United States,* 32 F. (2d) 844 (C. C. A. 8th); *Bolich, In-*

[1] These provisions are by no means novel or unique. They had their prototype in the Interstate Commerce Act of 1887 (c. 104, 24 Stat. 379), and they are matched by similar provisions in approximately twenty statutes authorizing the issuance of summons by administrative officers and commissions and their enforcement by the district courts. See *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; Note to Rule 45, Federal Rules of Civil Procedure.

ternal Revenue Agent v. *Rubel,* 67 F. (2d) 894 (C. C. A. 2nd).

Petitioner, however, chose not to appeal from that order, and persisted in his refusal to answer questions. It was then that an application was made by the revenue agent for an order on the petitioner to show cause why he should not be imprisoned until he should obey the order of the court and so purge himself of contempt. An opportunity was thus afforded of a second hearing in the District Court directed to the privilege of petitioner against answering the questions put to him by the agent. The opportunity was availed of, and after hearing the petitioner and arguments of counsel, the District Court on April 28 committed petitioner to the custody of the marshal to be confined in jail until he should purge himself of his contempt by obeying the order of April 23. This order of April 28 afforded a second basis for appeal. How that appeal should have been taken is the issue here.

Petitioner insists that his appeal under the Criminal Appeals Rules, by notice of appeal, was proper because the proceeding and order were for a criminal contempt. We may assume that if the order did in fact punish petitioner for criminal contempt the Criminal Appeals Rules would apply. This assumption is supported by the decision in *Wilson* v. *Byron Jackson Company,* 93 F. (2d) 577 (C. C. A. 9th) and by the implications of *United States* v. *Goldman,* 277 U. S. 229, holding that the Criminal Appeals Act is applicable to criminal contempts.

Compare also *Gompers* v. *United States*, 233 U. S. 604.[2]

Our position, and that of the court below, is that the proceeding was one for civil contempt, that the order entered was the appropriate disposition of such a proceeding, and that, therefore, the Criminal Appeals Rules had no application.

Putting aside for the moment two suggestions of petitioner—that there was no civil action pending, and that the United States or its agents cannot in any event bring proceedings for civil contempt—

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[2] The argument to the contrary would rest on the words "with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases," contained in the Act of March 8, 1934, 48 Stat. 399, and the Criminal Appeals Rules pursuant thereto. See 292 U. S. 660, 661. But these words should probably be regarded as simply descriptive of the ordinary situations where a defendant has been placed in jeopardy and judgment of conviction entered against him. In *Gompers* v. *United States*, 233 U. S. 604, a comparable question was presented. The statute of limitations for criminal offenses outlawed prosecution, trial, or punishment "unless the indictment is found, or the information is instituted" within three years after the offense was committed. The court held that the statute was applicable to proceedings for criminal contempts, despite the inapplicability of the quoted words to many proceedings for criminal contempt. The Criminal Appeals Rules would be literally applicable in all particulars where the contemnor pleads guilty, and also where, in accordance with sections 21 and 22 of the Clayton Act, 38 Stat. 738–739, a jury trial is had and a verdict of guilty returned. It would seem that where there is an order committing for an admittedly criminal contempt, the mode of appeal was not intended to depend upon whether there was a jury trial or a finding of guilt by the court.

there can be no doubt, we submit, that the order was one of committal for civil contempt and appealable accordingly. For purposes of appeal, the character of the order determines whether the cause is civil or criminal. An order which imposes an unconditional fine or unconditional imprisonment for contempt stamps the judgment as criminal; an order which imposes a compensatory fine payable to the injured party, or a fine or imprisonment conditional on the failure of the contemnor to obey the court's order, marks the judgment as civil. *Matter of Christensen Engineering Co.*, 194 U. S. 458; *In re Merchants Stock Co., Petitioner*, 223 U. S. 639; *Union Tool Co.* v. *Wilson*, 259 U. S. 107; *Fox* v. *Capital Co.*, 299 U. S. 105. Where the order combines civil and criminal sanctions, the presence of the latter is controlling for purposes of appeal. *Ibid.* And where the order is a denial of any redress, the prayer in the application furnishes the readiest test of the character of the judgment for appeal. *Lamb* v. *Cramer*, 285 U. S. 217.

These are manifestly rules of thumb, and as such they have peculiar usefulness as an assured guide to the formalities of appeal, while they do not prejudice the assertion of objections to the character of the order entered. Thus in the *Merchants Stock Co.* case, *supra*, where a fine was imposed for violation of a temporary injunction, the fine payable one-fourth to the United States and three-fourths to the injured party, it was held that the order was a final criminal judgment, not an inter-

locutory civil order, and so was reviewable on writ of error, but that the question remained whether the proceedings were appropriate to support the criminal penalty. See also *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418, 449.

Judged by the nature of the order entered, the present cause is indisputably civil for purposes of appeal. The petitioner was not ordered committed at all events, but only unless and until he should comply with the court's prior order. Persons thus committed "carry the keys of their prison in their own pockets." *In re Nevitt*, 117 Fed. 448, 461 (C. C. A. 8th). The sanction is that which courts of equity traditionally employed to secure the enforcement of their orders *in personam*.[3] The sanction is not punitive but coercive. It is in the nature of execution of the court's processes. See *Ex parte Grossman*, 267 U. S. 87, 111; *Michaelson* v. *United States*, 266 U. S. 42, 66; *Oriel* v. *Russell*, 278 U. S. 358; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324; *In re Nevitt, supra; Pitt* v. *Davison*, 37 N. Y. 235. Such an order, as the foregoing cases show, is the clearest kind of an adjudication of civil contempt.[4]

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[3] See 9 Holdsworth, *History of English Law*, 352–353; Huston, *Enforcement of Decrees In Equity*, 76–77.

[4] The nomenclature in English practice is perhaps more descriptive. 7 Halsbury's Laws of England, Tit. Contempt. of Court., distinguishes between "criminal contempt" and "contempt in procedure." It is recognized that contempt in procedure, insofar as it involves more than an unintentional disregard of a court's process, may partake of criminal contempt as well, and so have a "twofold character," giv-

In stressing the nature of the order, it is not meant to suggest that there was any divergence between the character of the order and the character of the anterior proceedings. On the contrary, the proceeding from beginning to end was typically one for civil contempt. The act of disobedience itself, like most such acts, perhaps took "the characteristics of both a civil and a criminal contempt, and so may not be classified as exclusively one or the other." *Lamb* v. *Cramer,* 285 U. S. 217, 221. The application of the revenue agent for a rule and order to show cause made it plain at the outset, however, that what was sought was simply a coercive order to compel obedience to the prior order. The application was that the petitioner show cause "why he should not be imprisoned in some proper jail until such time as he shall obey the order of this Court, heretofore entered * * * and thus purge himself of his said contempt" (R.

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ing rise both to a remedial right in the adversary and a power of penal or disciplinary action in the court. *Id.* p. 24 (2d ed.). The *Annual Practice* denotes contempts as "special" and "ordinary." The latter are our civil contempts, " 'incurred by a party's neglect or refusal to do some act which is in justice due to the other party to the cause, such as the giving of answers, the payment of costs, or the like, and the imprisonment which follows is at the prayer of the other party—a prayer to which the court cannot refuse to accede without a breach of its duty and a denial of justice' (per Sir John Nicol, *Barlee* v. *Barlee*, 1 Add. 301). See Edwards on Execution, pp. 210-214." *Annual Practice, 1939*, p. 809. Sir John Fox, *Contempt of Court*, p. 44, adopts the terms "civil" and "criminal."

39).[5] At the hearing on the order to show cause, the United States Attorney consistently maintained that the proceeding was for civil contempt (R. 58, 79). Likewise the District Court, in ruling that the risk of self-incrimination must be determined objectively, and not by the belief of the petitioner, explained that the proceedings were for civil, and not criminal, contempt (R. 73):

> The COURT. The only order the court would make in this case is that he be confined until he comes into court and makes the answers the court ordered he shall make, that is the answers to questions properly asked.
>
> Mr. MAURY. We except.
>
> The COURT. He is not here for the purpose of punishment. The request is he be confined until he answers the questions asked as ordered by the court.
>
> Mr. MAURY. That is punishment.

---

[5] It is true that the rule and order thereafter issued by the court directed petitioner to show cause why he should not "be punished" for his disobedience of the prior order (R. 46). The use of the term "punish" in this connection is not of significance. The order to show cause was similarly framed in *Lamb* v. *Cramer*, 285 U. S. 217, 220, and this Court held the proceeding to be remedial and civil in view of the prayer of the petition for relief. See also the observations of Judge Learned Hand in *In Re Guzzardi*, 74 F. (2d) 671, 672 (C. C. A. 2d): "'Punishment' is a word apt for civil contempts and constantly so used. Thus, if a man be imprisoned for violation of a decree till he complies with it, he would regard himself as 'punished' though he could get out when he chose."

Although on the suggestion of petitioner's counsel a plea of not guilty was entered (R. 58) this was followed the same day by the colloquy quoted above, and on the following day the court announced that counsel and court were in error in permitting the plea to be entered, since the proceeding was not for a criminal contempt (R. 79). And the order (R. 83), as has been observed, was unequivocally a civil sanction.

Thus the application, the hearing and the determination were all civil in character, and the petitioner cannot claim variance or surprise. Cf. *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418. The petitioner's contention must be, and it avowedly is, that the contempt was not susceptible of treatment as civil. This contention has two branches: (1) That there was no civil action pending; and (2) that the United States or its agents cannot sponsor a proceeding for civil contempt. These two arguments may be considered in turn.

1. The argument that the contempt did not grow out of a pending civil action curiously overlooks the basic proceeding, the application to the District Court by the revenue agent for an order enforcing the summons. This presented a civil case within the cognizance of the District Court.[6] Any conten-

[6] The title of the case in the District Court was "In the Matter of the Application for an Attachment Against William McCrone" (R. 1, 27). The style of cases of this kind, brought by revenue agents, varies. See, e. g., the following: *Internal Revenue Agent* v. *Sullivan*, 287 Fed. 138 (W. D.

tion to the contrary would simply be an attempt to reargue *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, which put at rest the notion that because the proceeding to compel testimony was in aid of a nonjudicial investigation it could not be deemed a true case or controversy. See the dissenting opinion in that case, 155 U. S. 3.

Furthermore, the proceeding brought by the revenue agent was pending at the time of the order adjudging petitioner in contempt, in the only sense in which the pendency of the proceeding is important. The essential feature in this regard is that the court retains jurisdiction after a final order or decree where the order or decree has not been satisfied. In this sense the proceeding for contempt is part of the main cause, which has not terminated. *Leman* v. *Krentler-Arnold Co.,* 284 U. S. 448, 452–453; *Lamb* v. *Cramer,* 285 U. S. 217, 221.

2. The argument that disobedience to an order for the benefit of the United States or its agents cannot constitute civil contempt is one which, if accepted, would have serious consequences. Such a position seems to have been adopted in *Federal Trade Commission* v. *A. McLean & Son,* 94 F. (2d)

N. Y.); *United States* v. *First National Bank,* 295 Fed. 142 (S. D. Ala.), affirmed, 267 U. S. 576; *In Re International Corporation Co.,* 5 F. Supp. 608 (S. D. N. Y.); *Brownson* v. *United States,* 32 F. (2d) 844 (C. C. A. 8th); *Bolich, Internal Revenue Agent* v. *Rubel,* 67 F. (2d) 894 (C. C. A. 2d); *Miles* v. *United Founders Corp.,* 5 F. Supp. 413 (D. N. J.).

802, (C. C. A. 7th), and because of the substantial conflict with that case the Government did not oppose certiorari in the case at bar. The *McLean* case did, however, involve the violation of a cease and desist order by completed acts of disobedience, and the redress sought by the Commission was therefore compensatory, not coercive. In this respect the cases differ, though it is not perceived why a genuinely compensatory fine, to reimburse for the expense of discovery and proof of violation of an order, should not be regarded as a civil sanction even where a governmental agency is the aggrieved party. Compare *Helvering* v. *Mitchell*, 303 U. S. 391.[7]

To accept the petitioner's argument would produce the anomaly that in an ordinary civil action between the United States and a private party, the treatment of disobedience to an order in the proceeding, such as refusal to obey a subpoena, would depend on whether the disobedience was injurious to the Government or to its adversary. No plausible reason can be suggested for such a discrimination.

Moreover, if the Government were confined to a proceeding for criminal contempt, the consequences would be unfair to both sides. The Government

[7] *Forrest* v. *United States*, 277 Fed. 873 (C. C. A. 9th) (petitioner's brief 20) does not support petitioner's position. There the contempt lay in acts of violence in disregard of an injunction in a labor dispute; the prayer in the contempt proceedings did not speak of compensatory relief; and the court ordered imprisonment for 60 days and a fine of $100.

would presumably have to prove its case beyond a reasonable doubt, and might have to establish the bad faith of the disobedient party. See *Michaelson* v. *United States,* 266 U. S. 42, 66. The Government would probably be unable to compel the party to testify. *Ibid.* The Government could not ask that the party be adjudged in contempt as a matter of right, but only as a matter within the discretion of the court. Cf. *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 112; *E. Ingraham Co.* v. *Germanow,* 4 F. (2d) 1002 (C. C. A. 2d); *Enoch Morgan's Sons Co.* v. *Gibson,* 122 Fed. 420 (C. C. A. 8th). And in the event that the court, after hearing evidence, adjudged the party not to be in contempt, the Government would have no right of appeal. Cf. *United States* v. *Goldman,* 277 U. S. 229; *United States* v. *Bittner,* 11 F. (2d) 93 (C. C. A. 4th); with which compare *Lamb* v. *Cramer,* 285 U. S. 217.

The party charged with contempt would also be subjected to irrational disadvantages. An effort to show that the original order was erroneous and that it should not be enforced for the benefit of the Government would be legally unavailing, except perhaps in mitigation of punishment. *Worden* v. *Searls,* 121 U. S. 14, 26–27; *McCann* v. *New York Stock Exchange,* 80 F. (2d) 211 (C. C. A. 2d). If adjudged in contempt, the sentence would be one of absolute fine or imprisonment. And the party in contempt would necessarily suffer the obloquy of a criminal conviction though the Government would be willing to rest content with a civil sanction.

The presence of the Government as a party can hardly require so grave a distortion of what would otherwise be recognized as a simple proceeding to enforce a procedural order of the court.

The state courts appear not to have taken the view of petitioner, in cases in which the State is a party. The decisions have applied the ordinary distinctions in state practice between civil and criminal contempts, and have frequently held, where the State is a party, that contempts may be redressed as civil at the instance of the State. *Department of Health of the State of New Jersey* v. *Borough of Fort Lee,* 108 N. J. Eq. 139 (failure to make disposition of sewage in conformity with decree); *In re Stewart,* 121 Wash. 429 (refusal of witness to testify); *Locrasto* v. *State,* 202 Ind. 277 (failure to obey restraining order in suit to abate nuisance); *People* v. *Kizer,* 151 Ill. App. 6 (failure to obey injunction in suit to abate nuisance). *Witmer* v. *District Court of Polk County,* 155 Iowa 244 (refusal to testify in tax case).

It is submitted that the contempt in the case at bar was correctly held to be civil, and that therefore the appeal taken under the Criminal Appeals Rules was ineffective, there being no allowance of an appeal as required by Section 8 (c) of the Act of February 13, 1925, as amended (*infra,* p. 27). *Alaska Packers Assn.* v. *Pillsbury,* 301 U. S. 174.

II

THE FEDERAL RULES OF CIVIL PROCEDURE ARE NOT APPLICABLE TO CURE THE INEFFECTIVE APPEAL; AND IN ANY EVENT THERE IS NO NEED FOR FURTHER PROCEEDINGS IN THE COURT OF APPEALS

Petitioner does not here contend, and did not contend below, as the court pointed out (R. 116), that there was any allowance of appeal. The only basis for supporting the appeal if the contempt was civil is that the new Federal Rules of Civil Procedure are applicable. Rule 73 (a), *infra*, p. 28, provides that "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal." Thus an allowance of appeal is made unnecessary. The Rules became effective September 16, 1938.

Petitioner's notice of appeal, pursuant to the Criminal Appeals Rules, was filed May 2, 1938. The three-months period for a civil appeal from the order of April 28, 1938, expired July 28, 1938. Thus at the time the new Rules became effective, the judgment had become final and no longer appealable.

Rule 86 of the new Rules, *infra*, p. 29, provides that they "govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work

injustice, in which event the former procedure applies." With full appreciation of the desirability of construing the Rules in a liberal spirit, it is difficult to conclude that they were meant to revive a case which was "pending" in the Court of Appeals only in the sense that that court had power to determine the effectiveness of the purported appeal; by hypothesis that so-called appeal was ineffective, and doubtless the Court of Appeals could have been ordered by writ of prohibition to relinquish the case. This was the situation unless Rule 86 worked a revival. The language of the Rule, referring to "further proceedings" in "actions then pending," suggests that no revival was intended, and the dissenting judge below acknowledged that this view was apparently held by the Chairman of the Committee which submitted the Rules. Cf. *Tighe* v. *Maryland Casualty Co.,* 99 F. (2d) 727 (C. C. A. 9th).

If the Court should nevertheless conclude that the appeal was effective, we urge that the Court dispose of petitioner's objections to the adjudication of contempt without remanding the cause for that purpose to the Circuit Court of Appeals. Cf. *Utah Fuel Co.* v. *National Bituminous Coal Commission,* No. 528, present Term; *Bowen* v. *Johnston,* No. 359, present Term (both decided January 30, 1939).

Petitioner makes no substantial objection to the order if it be regarded as civil. It is noteworthy, we believe, that petitioner advances with reluctance

the view of the dissenting judge below that the contempt was civil but that the order was properly appealed from. And the studious avoidance of an appeal as in a civil case, even by way of supplement to the notice of appeal, reinforces the conclusion that petitioner presents no substantial question if the contempt be viewed as civil.

The claim of self-incrimination is patently without merit. Nowhere is it suggested how an answer to the questions asked could have any tendency to incriminate petitioner under any laws, much less a direct tendency to incriminate him under the laws of the United States. Questions objected to much more plausibly have been sustained even in proceedings for criminal contempt. *Mason* v. *United States*, 244 U. S. 362; *Miller* v. *United States*, 95 F. (2d) 492 (C. C. A. 9th); *Abrams* v. *United States*, 64 F. (2d) 22 (C. C. A. 2d); *United States* v. *Flegenheimer*, 82 F. (2d) 751 (C. C. A. 2d).

Finally, the point made that the record does not disclose the name of the taxpayer under investigation is without merit, since the summons served on petitioner did disclose the name (R. 23). Omission of the name from the public records of the court may be deemed to be in the interest both of the Government and of the taxpayer, and can not prejudice the petitioner.

This proceeding has been pending for almost a year before three courts, and meanwhile the information sought has been withheld and the enforcement of the revenue laws obstructed. It is our po-

sition that the appeal was properly dismissed; but if this conclusion be not accepted, we urge that the order of the District Court be now affirmed without an additional hearing in the court below.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below; or, in the alternative, should affirm the order of the District Court.

Respectfully submitted.

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MARCH 1939.

APPENDIX

Act of February 13, 1925, c. 229, 43 Stat. 936, as amended.

SEC. 8. (c) No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree. (U. S. C., Title 28, Sec. 230.)

Judicial Code:

SEC. 268. *Administration of oaths; contempts.*—The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (U. S. C., Title 28, Sec. 385.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 617. JURISDICTION OF COURTS.

(a) If any person is summoned under the internal-revenue laws to appear, to testify, or to produce books, papers, or other data,

the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data. (U. S. C., Title 26, Sec. 1523.)

SEC. 618. EXAMINATION OF BOOKS AND WITNESSES.

Section 1104 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons." (U. S. C., Title 26, Sec. 1514.)

FEDERAL RULES OF CIVIL PROCEDURE

RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS.

(a) *How taken.* When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review

of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

RULE 86. EFFECTIVE DATE.

These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

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SUPREME COURT OF THE UNITED STATES.

No. 660.—October Term, 1938.

William McCrone, Petitioner,
vs.
United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 17, 1939.]

Mr. Justice Black delivered the opinion of the Court.

The Court of Appeals dismissed petitioner's appeal from a judgment of contempt for failure to obey a District Court's order to testify before an Internal Revenue official.[1] This dismissal was proper if the contempt proceeding was civil and not criminal. A notice of appeal was filed and a bill of exceptions signed. But petitioner's appeal was not, as appeals from civil judgments were required to be, applied for or allowed by the trial judge or a judge of the Court of Appeals.[2]

The facts disclose:

On April 21, 1938, an Internal Revenue agent, acting under 26 U. S. C., § 1514 (copied in the margin),[3] served petitioner with summons to appear before him and testify in connection with the tax liability of another. Petitioner responded to the summons, but declined to give any statement or information as to the matter under inquiry. Thereupon, both the agent and the Assistant United States Attorney for the District appeared before the District Court, and the agent filed an affidavit of facts and prayed that petitioner be ordered to submit to such questions "as may be propounded to him . . . that are material and perti-

1 100 Fed. (2d) 322.

2 28 U. S. C. § 230; Alaska Packers Association *v.* Pillsbury, 301 U. S. 174.

3 "The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

nent to the subject matter" of the investigation. After hearing, in which petitioner appeared, the District Court ordered him to appear before the agent and testify upon "all matters and facts within . . . [his] knowledge and concerning the subject matter of the inquiry and investigation, . . ." Petitioner did so appear but again declined to answer the agent's questions. After a second hearing by the District Court, petitioner was found in contempt for failure to obey the Court's previous order to testify before the agent and was ordered "held in . . . jail . . . until . . . [he] purges himself of . . . contempt by obeying the order" to testify.

Petitioner insists that no civil action was involved here and that proceedings to which the United States and its agents are parties can not be civil.[4] However, Article 3, Section 2, of the Constitution, expressly contemplates the United States as a party to civil proceedings by extending the jurisdiction of the Federal judiciary "to Controversies to which the United States shall be a Party." An action by the Interstate Commerce Commission to compel a witness to testify is "a direct civil proceeding, expressly authorized by an act of Congress, in the name of the Commission, and under the direction of the Attorney General of the United States, against the witness . . . refusing to testify, . . ."[5] So here, the mere presence of the United States as a party, acting through its agents, does not impress upon the controversy the elements of a criminal proceeding.[6] In accordance with its constitutional authority to do so, Congress has expressly authorized such a proceeding by an agent of the United States in the Federal courts "to compel . . . attendance, testimony, or production of books, papers, or other data." (26 U. S. C. § 1523).[7]

While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the

[4] Petitioner relies on Federal Trade Commission *v.* A. McLean & Son, 94 Fed. (2d) 802, 804. There the Court of Appeals for the Seventh Circuit said, "we became convinced that the [Federal Trade] Commission, an agency of the Government, representing no private interest of its own, but acting solely in the public interest, had no such standing as a private party that it could utilize procedure [civil contempt] intended to safeguard the rights and interests of private parties." Because of the conflict on this point in the judgment below, we granted certiorari. — U. S. —.

[5] Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 470.

[6] Cf., Helvering *v.* Mitchell, 303 U. S. 391, 402.

[7] Cf., Brownson *v.* United States, 32 Fed. (2d) 844, 848, 849; United States *v.* First Nat. Bank, 295 Fed. 142, affirmed 267 U. S. 576.

purposes of the complainant, and is not intended as a deterrent to offenses against the public.[8] Here, the summons served on petitioner required only that he testify in a tax inquiry properly conducted by an agent of the Bureau of Internal Revenue. And the agent's petition to the District Court, to which we may look in determining the nature of the proceeding,[9] invoked judicial assistance solely in obtaining petitioner's testimony. Authority of the Court was sought to buttress the procedure for collection of taxes and not in "vindication of the public justice",[10] as in criminal cases.

The judgment of contempt was civil, and appeal from it was governed by the statutory rules of civil appeals.

There remains the suggestion that the appeal in question can be considered a civil appeal properly taken under Rule 73 of the new Federal Rules of Civil Procedure which became effective September 16, 1938.[11] However, petitioner's notice of appeal was filed May 2, 1938. The controlling statute required application for allowance of a civil appeal within three months after judgment from which appeal was sought. The three months expired July 28, 1938, and the contempt judgment had become unappealable well before the effective date of the new Rules. Therefore, petitioner is not aided by the provision of Rule 86 that the new Rules shall "govern all . . . actions then pending, [September 16, 1938] . . ." This action—from which there was then no right of appeal—was not pending within the meaning of the Rule.

The Court of Appeals was not in error in dismissing petitioner's appeal for failure to comply with the statutory requirements governing civil appeals. Its judgment is

Affirmed.

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[8] Gompers *v.* Bucks Stove and Range Co., 221 U. S. 418, 441; Fox *v.* Capital Co., 299 U. S. 105; Lamb *v.* Cramer, 285 U. S. 217, 220, 221; Oriel *v.* Russell, 278 U. S. 358, 363; Ex parte Grossman, 267 U. S. 87, 111; Union Tool Co. *v.* Wilson, 259 U. S. 107; In re Merchants' Stock Co., Petitioner, 223 U. S. 639; Matter of Christensen Engineering Co., 194 U. S. 458; Bessette *v.* W. B. Conkey Co., 194 U. S. 324.

[9] Cf., Lamb *v.* Cramer, *supra*, 220; Gompers *v.* Bucks Stove and Range Co., *supra*, 448.

[10] Cf. Fox *v.* Capital Co., *supra*, 108.

[11] "Rule 73. Appeal to a Circuit Court of Appeals.

How taken. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."